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In the Supreme Court of the United States

OCTOBER TERM, 1989

JAY E. GREGORY, SHERIFF OF PATRICK COUNTY, VIRGINIA, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

KENNETH W. STARR
Solicitor General

JAMES P. TURNER
Acting Assistant Attorney General

JESSICA DUNSAY SILVER
SUSAN D. CARLE
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

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QUESTION PRESENTED

Whether the court of appeals correctly decided that the district court committed clear error in concluding that there was insufficient evidence to prove that petitioners engaged in sex discrimination in violation of Title VII.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1B-42B) is reported at 871 F.2d 1239. The district court's opinion (Pet. App. 1A-23A) is not yet reported.

JURISDICTION

The opinion of the court of appeals was issued on April 14, 1989. A petition for rehearing was denied on July 20, 1989. Pet. App. 1C-3C. The petition for a writ of certiorari was filed on October 12, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In June 1983, the United States brought suit against Jesse W. Williams, the Sheriff of Patrick County, Virginia,

alleging a pattern or practice of refusing to consider women for deputy sheriff positions in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.* Later that year, Williams lost his reelection bid for sheriff to Jay Gregory, and Gregory was substituted as the defendant. Pet. App. 3B-4B.

At trial, the government presented testimony by four women who alleged that they were denied jobs as deputy sheriffs, a job title that encompassed various positions including corrections officer and courtroom security officer. See *United States* v. *Gregory*, 818 F.2d 1114, 1115 (4th Cir.), cert. denied, 484 U.S. 847 (1987). Two witnesses, Doris Scales and Wanda Hylton, both testified that when they inquired about being hired as deputy sheriffs, the Sheriff told them that he would not consider women for deputy positions because he did not think that women could do the job. Pet. App. 12B-15B. In his testimony, the Sheriff stated that he maintained a policy of refusing to consider women for positions as corrections officers out of concern for inmates' privacy. *Id.* at 15B-16B. The government also introduced statistics showing that, as of 1982, no woman had ever been hired into the deputy sheriff positions at issue. *Id.* at 21B. Additional evidence was presented to demonstrate that the reasons offered by the Sheriff for not hiring women in individual cases were pretextual.[1]

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[1] For example, Sheriff Williams maintained that he had refused to hire Doris Scales because of her alleged "bad moral and credit reputation and her overbearing personality." Pet. App. 39B-40B n.30. However, the evidence showed that the Sheriff hired male deputies with "bad moral reputations," criminal records, poor driving records, and "worse credit problems." *Ibid.*

The evidence at trial also showed that, after Kathy Sheppard's job as civil process server was eliminated for budgetary reasons, Sheriff Gregory refused to consider her for any of the two vacant deputy positions or the 14 carryover positions. The court of appeals found that

2. After trial, the district court dismissed the government's complaint on the ground that deputy sheriff positions fell within the "personal staff" exemption to Title VII defined in 42 U.S.C. 2000e(f). *United States* v. *Gregory*, 582 F. Supp. 1319 (W.D. Va. 1984). By unpublished opinion, the Fourth Circuit vacated and remanded in light of an intervening decision in the circuit, finding that the judge had erred in applying the "personal staff" exemption. *United States* v. *Gregory*, No. 84-1613 (Oct. 1, 1985).

On remand, the district court found that one individual, Stephanie Ressel, had been unlawfully discriminated against in being denied a position as a courtroom security officer. Pet. App. 5B n.4. The court again held, however, that three types of deputy positions fell within the personal staff exemption and that maleness was a bona fide occupational qualification (BFOQ) for a fourth position, corrections officer. See *id.* at 5B.

The government again appealed, and the court of appeals reversed on the grounds that deputy sheriffs were not personal staff within the meaning of the exemption, and that maleness was not a BFOQ for corrections officers. The court found that the Sheriff had offerred no evidence that the total exclusion of females from the position of corrections officer was necessary to accommodate inmates' privacy interests. *United States* v. *Gregory*, 818 F.2d at 1116-1118. The court again remanded for further proceedings on the merits of the discrimination claims. *Id.* at 1117.

3. On remand, the district court held that the government's evidence was insufficient to prove its case. Wanda Hylton testified that when she asked the Sheriff during a

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Sheriff Gregory's claim that his decision was based on Sheppard's inferior qualifications was belied by Sheppard's excellent job record, which was superior to that of other successful applicants. Pet. App. 41B-42B n.31.

job interview if he would consider hiring a woman as a deputy, he responded "by chuckling and saying that he would not hire a woman in his department as a deputy, that he did not think that women could handle the job, that they could not handle men." Pet. App. 9A-10A. Although the Sheriff denied having made these statements, *id.* at 12B, the trial court credited Hylton's testimony. However, the court concluded that the Sheriff's admission of discrimination had been "made in jest" and thus did not evince an intent to discriminate. *Id.* at 11A.

The district court further held "meaningless" the government's statistical evidence that, as of 1982, no women had ever been hired in the deputy sheriff positions at issue. Pet. App. 5A. To support this holding, the court cited the absence of evidence in the record as to whether women other than the four who testified had applied for jobs as deputies. *Ibid.* Also, the trial court noted that most of the deputy sheriff positions that fell open during Sheriff Williams's tenure were filled by the reappointment of employees hired by a predecessor. This fact, in the district court's judgment, rendered the "data base" too small to be reliable. *Id.* at 6A-7A.

4. On appeal, the Fourth Circuit acknowledged that it could reverse the district court's findings of fact under the clearly erroneous standard only in "a rare case" in which it was left with a "definite and firm conviction that a mistake has been committed." Pet. App. 10B (citing *Anderson* v. *City of Bessemer City*, 470 U.S. 564 (1985)). The court found this to be such a rare case, however, and concluded that the district court had committed clear error in a number of respects.

First, the trial court had clearly erred in finding that the Sheriff's admission to Hylton that he would not hire a woman as a deputy was a "joke." In reaching its conclusion, the trial court relied exclusively on Hylton's testimony that the Sheriff "chuckled when he admitted to his policy

of not hiring female deputies." The court of appeals ruled, however, that the district court's refusal "to recognize the Sheriff's bold admission of discrimination" was not justified by the fact that the Sheriff "was good-humored when he made it." Pet. App. 14B-15B. The court of appeals found the record devoid of any evidence that the Sheriff had not meant what he said. Even the Sheriff himself had never claimed that he was joking, but instead had denied the incident altogether. *Id.* at 14B. Moreover, given that the district court had treated as "serious" the Sheriff's subsequent advice to Hylton that she seek a different job, it was implausible to conclude that his disclosure of his discriminatory policy was not sincere as well. *Ibid.* The court concluded that the trial court's "erratic[ ]" and "contradictor[y]" analysis of Hylton's testimony was clearly erroneous. *Ibid.*

Second, the court of appeals decided that the district court had committed clear error by failing to consider other highly probative testimony in the record. The district court completely failed to discuss the testimony of Doris Scales that the Sheriff had remarked to her on several occasions that he would not hire a woman deputy because he did not "feel like they're capable of handling the job as a deputy." Pet. App. 15B. And following the court of appeals' holding that maleness was not a BFOQ for the position of corrections officer, the district court simply chose to ignore the Sheriff's key admission on the witness stand that he had a policy of refusing to hire women as corrections officers. *Ibid.* The district court's complete disregard of these statements rendered insupportable its conclusion that the government had failed to prove a discriminatory practice.

The court of appeals also held that the district court had incorrectly ruled that statements to an EEOC officer by the Sheriff's attorney that the Sheriff had a policy of refusing to hire women as deputy sheriffs were inadmissible as hearsay. Pet. App. 17B-20B. And, in respect of the district

court's dismissal of the government's statistical evidence as "meaningless," the court of appeals held that the lower court had misconstrued the law developed by this Court on the use of statistical evidence in Title VII cases. *Id.* at 21B-29B. The court of appeals recognized that, contrary to the district court's conclusion, the precedents of this Court teach that "applicant flow data is not required to prove discrimination through statistics." *Id.* at 23B. Except in the case of jobs requiring highly specialized skills, "[e]vidence of longlasting and gross disparity between the composition of a work force and that of the general population thus may be significant." *Id.* at 24B-25B (quoting *Teamsters* v. *United States*, 431 U.S. 324, 340 n.20 (1977)); see also Pet. App. 25B-29B. Moreover, the district court's findings that not all deputy positions were open during the relevant period did not warrant the complete disregard of evidence showing "the inexorable zero." *Id.* at 30B (quoting *Teamsters* v. *United States*, 431 U.S. 324, 342 n.23 (1977)). The court suggested that the evidence of such a hiring pattern should at least have been considered as part of the government's *prima facie* case. Pet. App. 29B.

On the basis of these rulings, the court of appeals reversed. The court concluded that the Sheriff's open admissions of a discriminatory practice in themselves sufficed to establish a clear Title VII violation. Pet. App. 20B. In the court's view, this evidence, "bolstered" by the figures showing no hires of women deputies as of 1982 (*ibid.*) and the trial court's own finding of one instance of unlawful discrimination (*id.* at 34B n.26), required reversal of the district court's judgment that the government had failed to demonstrate a practice of discrimination.[2]

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[2] In light of the admissions by the Sheriff, along with the evidence of pretext offered by the government with respect to the Sheriff's reasons for not offering deputy positions to individual women, the court of

ARGUMENT

This fact-bound case involves the straightforward application of principles established by prior decisions of this Court. The decision of the court of appeals is correct and presents no issue worthy of this Court's consideration. Further review is therefore unwarranted.

1. Petitioners contend that the court of appeals misapplied the clearly erroneous standard and engaged in an independent weighing of the evidence. Although the court of appeals did decide that certain key factual findings of the district court lacked support, it faithfully adhered to the clearly erroneous standard established by this Court.

Under this standard, a reviewing court must set aside the factual findings of a trial court if, after its review of all of the evidence, it "is left with the definite and firm conviction that a mistake has been committed." *Anderson* v. *City of Bessemer City*, 470 U.S. 564, 573 (1985) (quoting *United States* v. *United States Gypsum Co.*, 333 U.S. 364, 395 (1948)). Great deference must be accorded the trial court's account of the evidence; "[i]f the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it." *Anderson*, 470 U.S. at 573-574. However, a reviewing court must not approve factual findings by the trial judge that are "illogical or implausible." *Id.* at 577.

The court of appeals correctly applied this standard. In concluding that the evidence in the record as a whole rendered implausible the district court's finding that the Sheriff was speaking "in jest" when he acknowledged to Hylton that his hiring policy was discriminatory (Pet. App. 13B-15B), the court of appeals did not reverse a credi-

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appeals also found that individual complainants had been victims of sex discrimination. See Pet. App. 39B-42B & nn.30-31.

bility determination by the trial judge. Cf. *Anderson*, 470 U.S. at 575 (credibility determinations entitled to greatest deference). Indeed, the judge had credited Hylton's account of the exchange and implicitly rejected the Sheriff's testimony that no such conversation occurred. Instead, the court of appeals concluded that the trial court erroneously discounted Hylton's pivotal testimony on the basis of a finding of fact—that the Sheriff was "joking"—that was implausible on its face and lacking in evidentiary support. Reversal of such a clearly erroneous finding was fully justified under the standards defined in *Anderson*.

Equally well founded is the court of appeals' ruling that the district court committed clear error in ignoring evidence in the record of additional admissions by the Sheriff. The district court did not even attempt to explain why it made no mention whatsoever of Doris Scales' highly relevant testimony that the Sheriff had more than once told her that he would not consider women for deputy positions. Pet. App. 15B. Likewise, the court offered absolutely no justification for its failure to take account of the Sheriff's own acknowledgement at trial that it was his policy to refuse to hire women as corrections officers. *Id.* at 15B-16B. The trial court's complete disregard of these two additional statements of discriminatory intent rendered its conclusion that no discriminatory practice had been shown so "implausible" as to require reversal. *Anderson*, 470 U.S. at 577.[3]

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[3] Petitioners argue (Pet. 17-18) that it was error for the court of appeals, in reversing the trial court's finding of no discrimination, to rely on an admission of discrimination made by the Sheriff's attorney to an EEOC compliance officer. See Pet. App. 16B-21B. Petitioners contend that the court of appeals should not have credited this admission without first giving petitioner a chance to rebut it. But the court of appeals concluded that the record contained at least three other clear admissions by the Sheriff that his office maintained a discriminatory practice. Pet. App. 12B-16B. Since the purported admission by the peti-

Petitioners also contend that the court of appeals misapplied the clearly erroneous standard in finding that the district court erred in ignoring the statistical evidence that the Sheriff had never hired a woman deputy. This argument evinces a misunderstanding of the court of appeals' holding.

First, the court of appeals held that the Sheriff's own admissions of a discriminatory policy were sufficient in themselves to establish a Title VII violation; the government's statistical evidence merely "bolstered" an already overwhelming case of intentional discrimination. Pet. App. 20B. The court of appeals' decision therefore stands as correct on the basis of its treatment of the Sheriff's admissions alone.

In any event, the court of appeals' reversal of the district court's ruling that the statistical evidence was "meaningless" (Pet. App. 5A) was not in the nature of a reversal of the trial court's factual findings. The court of appeals had no significant quarrel with the trial court's findings as to the actual hiring patterns or with its evaluation of the reliability of the numbers.[4] Rather, the appeals court concluded that the trial court committed legal error in refusing to give any consideration at all to the statistics on the ground that to do so would contravene precedents of this Court.

The trial court was wrong to decide that an absence of applicant flow data rendered the statistical evidence inherently meaningless. On the contrary, this Court has held

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tioners' attorney merely confirmed a fact established by other evidence, it can make no difference that petitioners' attorney was not provided with an opportunity to deny making the statement.

[4] The court of appeals, at one point, did question the district court's findings as to the number of positions open for "new hires." Pet. App. 22B & n.13, 32B. However, it held that this issue was "not significant to our finding that the statistical evidence should not have been ignored by the district court." *Id.* at 22B n.13.

that when a job requires skills "that many persons possess or can fairly readily acquire"—as the court of appeals found to be the case for the deputy sheriff position (see Pet. App. 27B & n.18)—a sharp disparity between the representation of a group in a particular job as compared to the representation in the population at large can be "highly probative." *Hazelwood School Dist.* v. *United States*, 433 U.S. 299, 308 & n.13 (1977); see also *Teamsters*, 431 U.S. at 337-340 & n.20. Also, applicant flow data is of limited usefulness in situations like the one presented here, since open admissions of a discriminatory practice can be expected to discourage applications from the disfavored group. Cf. *Teamsters*, 431 U.S. at 365 ("If an employer should announce his policy of discrimination * * * his victims would not be limited to the few who * * * subjected themselves to personal rebuffs.").

Furthermore, petitioners' various criticisms of the government's "statistics" do not detract from the basic lesson of the figures: that the Sheriff's hiring patterns reflected "the inexorable zero." Such a "glaring absence" may properly be offered as evidence that a discriminatory practice is in operation. See *Teamsters*, 431 U.S. at 342 n.23.

2. Finally, petitioners contend (Pet. 19-22) that the Sheriff's admissions were insufficient to prove a case of intentional discrimination because they were nothing more than "stray remarks" based on sex stereotypes. As a plurality of this Court has noted, such remarks "do not inevitably prove that gender played a part in a particular employment decision." *Price Waterhouse* v. *Hopkins*, 109 S. Ct. 1775, 1791 (1989). Petitioners' argument is misguided. The Sheriff's statements that he would not hire women as deputies can hardly be characterized as the kind of sexism "in the air," see *ibid.*, that has no demonstrable effect on the hiring process. Rather, they are open confessions by the employer himself that he maintains a practice of dis-

criminatory hiring. Such admissions make this a simple case of intentional discrimination. The court of appeals, recognizing this, correctly reversed the lower court's implausible and illogical findings to the contrary.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

KENNETH W. STARR
Solicitor General
JAMES P. TURNER
Acting Assistant Attorney General
JESSICA DUNSAY SILVER
SUSAN D. CARLE
Attorneys

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